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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **RONALD DEAN YANDELL,** **Defendant and Appellant.**	**A105997** **(Contra Costa County Super. Ct. No. 021844-6)**

A jury convicted appellant, Ronald Dean Yandell, of voluntary manslaughter of Dino Gutierrez (Dino) with the personal use of a firearm. (Pen. Code, §§ 192, subd. (a), 12022.5, subd. (a).)[1] Appellant was sentenced to 65 years to life in state prison. He contends the voluntary manslaughter conviction is not supported by substantial evidence and the court's imposition of the upper term violated his federal constitutional rights. We reject these contentions and affirm.

BACKGROUND

Peter Gutierrez (Peter) testified that at about 11:00 p.m. on May 13, 2001, he and his uncle, Mark Gutierrez (Mark), were watching television in the family room of their El

[1] The jury also convicted him of first degree murder of William Joey Bedwell (Bedwell) and found true allegations of personal firearm use, personal discharge of a firearm and intentional and personal discharge of a firearm proximately causing great bodily injury and death to the victim who was not an accomplice. (Pen. Code, § 12022.53, subds. (b), (c), & (d).) Appellant does not appeal the murder conviction.

Sobrante home before going to bed. Rob Laster, Dino (Peter's uncle), Bedwell and appellant were in the living room. When Laster had arrived earlier in the day he carried a handgun and wore a bulletproof vest. Because Peter did not like or trust Laster, he went to bed armed with a dagger and brass knuckles. About 10 minutes after Mark left the room, and while Peter lay in bed, Peter heard what sounded like Dino and Laster wrestling over a gun. Peter then heard Laster laugh and heard about four gunshots being fired from the back part of the house. Dino ran into Peter's room, stared at Peter and then slumped back and fell to the floor. Peter then saw Laster get shot twice in the back while Laster was running from the living room to the back part of the house. Peter then saw Bedwell unable to walk, trying to scoot himself backwards from the living room area into the kitchen. Peter heard two more shots fired after which he heard Dino's brother, Mark, yelling his (Peter's) name. Peter and Mark then began fighting with appellant whom they ultimately subdued. On cross-examination, Peter admitted he did not see who shot Dino or Bedwell.

Mark testified that at about 11:00 p.m., when he left Peter's room to go to bed, Laster, Dino, Bedwell and appellant were in the living room. Shortly after he lay down, Mark heard a gunshot and jumped up to exit the room. As he stood by his closed door, Mark thought he heard Laster say, "Ronnie, Ronnie, don't," followed by two more gunshots. When Mark opened the door he saw Bedwell scooting backwards on the ground toward the kitchen saying, "Ronnie, you don't have to do this." Mark then saw Bedwell get shot twice more. Mark then attacked the shooter, later identified as appellant, and yelled for Peter to help. With Peter's help, Mark wrestled the gun out of appellant's hand and began beating him with it. After appellant was subdued, Mark called 911. He then saw Dino lying dead. Mark then threw the gun down in the living room and went outside to wait for the police. Mark identified the gun, a .357 Magnum, as belonging to Rob. Mark said he did not know who shot Dino or where Dino was shot.

Contra Costa County Deputy Sheriff Craig Jimenez was dispatched to the shooting scene. Mark, appearing upset and agitated, came out of the house and yelled, "I'm the victim here. The guy who did the shooting is inside. I beat the fuck out of him and threw

the pistol across the room." He also said that Mark said "the guy I beat up shot my brother." Shortly after Mark was taken into custody, Peter came out of the house, looking upset and holding an axe handle above his head. Peter was then taken into custody. Later, while standing outside the patrol car Mark said, "That dude on the kitchen floor isn't shot. I pistol whipped him. I beat the fuck out of him. I hope he dies. He shot my brother. I was trying to kill him. I pistol whipped that motherfucker and threw the gun in the living room." In a subsequent videotaped statement Mark told police that he attacked the person who he saw do the shooting. Several times Mark also said that he did not think that it was Laster that he beat up.

When Jimenez entered the house he saw appellant, who appeared to have major injuries to his head and face, lying on the kitchen floor. Dino was found dead inside the family room, and Bedwell was found lying dead in the doorway between the family room and living room. Laster was not at the Gutierrez house when the police arrived.

Criminalist Alex Taflya recovered the .357 Magnum revolver from the living room. Firearms expert Kenneth Fujii opined that the bullet recovered from Bedwell's body was fired from the recovered gun. He said that although the bullet recovered from Dino had "matching detail" with the recovered gun, there was not enough matching detail to determine whether the bullet recovered from Dino was also fired from that gun because of damage to the bullet. Fujii said that the matching detail was "slightly less" than that necessary to conclude that the bullet recovered from Dino was probably fired from the recovered gun.

The autopsy of Dino revealed a blunt force injury to his head and a fatal gunshot wound to his upper chest. The autopsy of Bedwell revealed three gunshot wounds. The gunshot wounds were to his left leg, chest, and torso. The gunshot wound to the torso was a fatal wound that could have been suffered while Bedwell was scooting back and the shooter was standing and firing down at him.

Defense counsel argued during closing argument that Laster used his own gun to kill Dino and Bedwell when he panicked during a drug deal gone awry.

DISCUSSION

I. *Substantial Evidence Supports the Voluntary Manslaughter Conviction*

Appellant contends his conviction of voluntary manslaughter of Dino is unsupported by substantial evidence.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' " (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Appellant argues that there was no direct evidence of who shot Dino and no evidence that appellant came to the Gutierrez house armed with a handgun, or that appellant had a motive to shoot and kill Dino. He also argues his conviction ignores the fact that Laster wore a bulletproof vest and was armed with a handgun while at the Gutierrez home on the day of the shooting, and there were "serious questions" raised at trial regarding the credibility of Peter and Mark. He asserts that because the evidence raises only a "suspicion or speculation" that appellant shot and killed Dino his conviction must be reversed for insufficiency of the evidence.

Having reviewed the entire record in accordance with the aforementioned principles, we conclude that substantial circumstantial evidence supports the jury's finding of voluntary manslaughter of Dino. Just prior to Peter and Mark hearing gunshots, appellant was seated in the living room with Dino, Bedwell and Laster. After

Peter heard gunshots, Dino came into his room then slumped and fell down dead. Peter then saw Laster get shot as he (Laster) ran from the living room. Peter then saw Bedwell, unable to walk, trying to scoot himself away from the living room. Mark said that after hearing a gunshot he heard Laster say, "Ronnie, Ronnie don't" followed by two more gunshots. He then saw Bedwell scooting backwards toward the kitchen, saying "Ronnie, you don't have to do this." Mark then saw appellant shoot Bedwell twice more. With Peter's help Mark wrestled the gun from appellant's hand. After Dino was shot, Laster was seen fleeing gunshots and saying, "Ronnie, Ronnie, don't," permitting the initial inference that either appellant or Bedwell shot Laster. Then, after Bedwell was scooting on the ground saying, "Ronnie, you don't have to do this," appellant shot him two more times. Based on the pleas by both Bedwell and Laster to appellant, the jury could reasonably conclude that appellant was the lone gunman, who initially shot Dino and then shot Laster and Bedwell. The absence of any evidence that appellant came to the Gutierrez house armed with a handgun, or had a motive to shoot and kill Dino, the fact that Laster wore a bulletproof vest and was armed with a handgun while at the Gutierrez home, and issues of credibility regarding Peter and Mark were all factual issues for resolution by the jury, not the reviewing court. It was within the jury's province to resolve those issues and the evidence before it against appellant. Since the circumstances reasonably justify the jury's findings, we must affirm the conviction.

II. *The Court Properly Imposed the Upper Term*

In imposing the 11-year upper term on the voluntary manslaughter conviction, the sentencing court noted the absence of any mitigating factors and that appellant had sustained numerous prior convictions, often violent in nature and of increasing seriousness.[2] The court also noted that appellant's prior performance on parole and

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[2] The probation report included numerous prior misdemeanor convictions stemming from 1981 including second degree burglary (Pen. Code, § 459), threatening with a weapon (Pen. Code, § 417, subd. (a)), resisting a peace officer (Pen. Code, § 148), battery (Pen. Code, § 242), reckless driving (Veh. Code, § 23103), driving under the influence (Veh. Code, § 23152, subd. (a)), assault with a deadly weapon (Pen. Code, § 245,

probation was unsatisfactory. Finally, the court noted that appellant's current and prior offenses indicated that he is very violent and an extreme danger to society.

In reliance on *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant argues the trial court's imposition of the upper term violated his Sixth Amendment right to jury trial.[3]

As set forth in *Apprendi* and reaffirmed in *Blakely*, " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra,* 124 S.Ct. at p. 2536; *Apprendi, supra,* 530 U.S. at p. 490.) *Blakely* explained, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely*, at p. 2537].) Under California's determinate sentencing law, the lower, middle and upper terms constitute a range of authorized punishments for an offense. The exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. Here, the 11-year term imposed for the voluntary manslaughter was the maximum statutorily authorized sentence for violating Penal Code section 192, subdivision (a). (Pen. Code, § 193.) Thus, the court's imposition of that maximum did not violate appellant's rights to jury trial or due process.[4]

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subd. (a)(1)), vehicle theft (Veh. Code, § 10851), resisting an officer (Pen. Code, § 69), and escape from jail (Pen. Code, § 4532, subd. (a)).

[3] This issue is currently pending before the California Supreme Court. (*People v. Towne,* S125677, rev. granted July 14, 2004.)

[4] After the completion of briefing, the United States Supreme Court decided *United States v. Booker* (2005) ___ U.S. ___ [2005 US Lexis 628].) *Booker,* in our view,

Irrespective of the ultimate resolution of the issues regarding the applicability of *Blakely* to California's determinate sentencing scheme and judicial decisionmaking regarding sentencing factors, appellant's upper term sentence may be affirmed because the court based its sentencing decision, in substantial part, on appellant's recidivism.

Blakely and *Apprendi* both specifically excluded the fact of prior convictions from their holdings. (*Blakely, supra,* 124 S.Ct. at p. 2536]; *Apprendi, supra,* 530 U.S. at p. 490.) The prior conviction exception has been broadly construed to apply to facts relating to a defendant's recidivism. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221-223.) Here, the sentencing court specifically cited appellant's numerous prior convictions and his poor performance on parole and probation. Thus, the court's imposition of the upper term did not rest exclusively on discretionary factors related to the offense. Since a single proper aggravating factor may support the imposition of the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728), we conclude that even assuming *Blakely* error, the two recidivist factors, and the lack of mitigating factors, supports the imposition of the upper term.

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clarifies that *Blakely*'s Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit,* but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, J.

Jones, P.J., Concurring

I agree with my colleagues' conclusion in this case but write separately to express my differing analysis of the effect of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) on California's determinate sentencing scheme, which I expressed more fully in my dissent in *People v. Picado*, review granted January 19, 2005, S129826.

In short, *Blakely* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2536.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id*. at pp. 2537-2538.) Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) Therefore, in general, I conclude a defendant is entitled to a jury determination of the facts that would permit the trial court to impose the upper term. However, I conclude that under the particular facts of this case, the "prior conviction" exception validates imposition of the upper term.

In *Blakely*, the United States Supreme Court applied the rule it expressed in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490: "'*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536, italics added.) I agree this rule reasonably implies that, under California's determinate sentencing scheme, the court may impose an upper term based on its own finding of a prior conviction, although I do not read the italicized phrase as having such a broad meaning that it includes all recidivist circumstances.

Here, the court, after considering the probation report, imposed the upper term based on its finding of no mitigating factors and three aggravating factors: (1) numerous prior convictions, often violent in nature and of increasing seriousness; (2) unsatisfactory

performance on probation and parole; and (3) appellant's violent character and extreme danger to society in light of his current and prior offenses.

All three factors have at their core the element that bring them within *Blakely's* "fact of a prior conviction" exception to its requirement that a jury find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the prescribed maximum. (*Blakely, supra*, 124 S.Ct. at p. 2536.) But they also contain elements that call for additional factual findings.

Factor one requires findings not only of prior convictions per se, but what quantity of prior convictions constitutes "numerous," what characteristics of the prior convictions constitute "violent" and "serious," and what time span constitutes "increasingly."

Factor two--unsatisfactory performance on probation and parole--necessarily derives from a prior conviction(s), but it requires a factual finding regarding "unsatisfactory."

Similarly, factor three--prior offenses indicate violent character and danger to society--derives from prior convictions (assuming the court here was using "offenses" as a synonym for "convictions"), but it requires a factual finding whether the behavior that resulted in those convictions "indicates" that appellant is "violent" and an "extreme danger" to "society."

These aggravating factors append qualifications to the bare bones fact of a prior conviction. Because the cited factors require additional factual assessments, they fall outside the *Blakely* "fact of a prior conviction" exception. Nevertheless, I conclude the failure to obtain a jury determination on these additional factors was harmless beyond a reasonable doubt, the standard by which a reviewing court assesses prejudice to an appeal based on federal constitutional grounds. (*Chapman v. California* (1967) 386 U.S. 18, 21-24.)

There was undisputed evidence that in the 20 years previous to the instant offense, appellant had at least 10 convictions. It is not reasonably probable that a jury would characterize any of them as benign, akin to an offense like possession of a small quantity of marijuana or petty theft of groceries. Rather, most of appellant's convictions cannot

be characterized as anything except violent and dangerous to others: threatening with a weapon, resisting an officer (twice), battery, reckless driving, assault with a deadly weapon, driving under the influence, and escape from jail.

The overwhelming evidence of the nature of appellant's prior convictions--primarily assaultive--and their quantity--an average of one conviction every two years--leads ineluctably to the conclusion that a jury would have found at least one of the three enumerated aggravating factors proved beyond a reasonable doubt. Given the court's finding of no mitigating factors, and because, as the majority notes, a single proper aggravating factor permits imposition of the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728), appellant did not suffer prejudicial error under the *Chapman* standard.

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Jones, P.J.